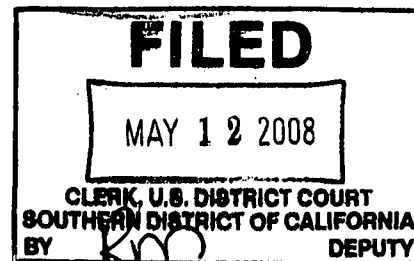


Wayne Holloway V04793  
CMC EAST  
P.O. BOX 8101  
SAN LUIS OBISPO, CA 93409



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Wayne Holloway

Petitioner,

v.

John Marshall, Warden

Respondent.

'08 CV 0861 JM AJB

Case No.

Petition for Writ of Habeas  
Corpus under 28 USCS 1651

(All Writs Act).

en banc review requested

To Presiding Justice and its Legal Representative of the federal district court, I the Petitioner Wayne Holloway presents this writ petition in light of the district court rejection to the merits of Petitioner's constitutional invalidity strike prior claim. The district court in their denial cited Lackawanna County Dist Atty v. Coss at 532 U.S. 394, 403-04, in which this holding by the U.S. Supreme Court curtailed the defendant's right to challenge a strike prior conviction under 2254 of the United States Code volume number 28.

(Take Judicial Notice to Dist Court's order at no. 06cv0226-LAB)

Factual and Procedural Background

On about August 22, 2003, Petitioner Holloway filed a motion challenging the constitutional validity of his strike prior (CT 0019). (Sup Ct no. SCD172406) This motion, of course, was denied and eventually lead to a sentence enhancement govern by the three strike law. (CT 0063) Afterwards, this strike prior claim was procedually raised on direct appeal; and also presented in a timely petition for review to the California Supreme Court, in which the state high court denied review without stating prejudice. (S127951)

However, Petitioner in turn sought relief in the fed dist court by filing a 28 USC 2254 writ of habeas corpus - arguing once again the constitutionality of his strike prior. The district court subsequently denied to entertain the strike prior claim under 28 USC 2254 and cited that the United States Supreme Court has curtailed a petitioner's ability to collaterally attack a prior conviction used to enhance a present sentence. (e.g. Lackawanna County Dist Att v. Coss at 532 U.S. 394, 403-04-Take Judicial Notice to Dist Court's order 06cv00226) Therefore, 28 USC section 1651 becomes applicable...

Standard Under 28 USCS 1651

The all writs act (28 USCS 1651) is meant to be used only in exceptional case where there is clear abuse of discretion or usurpation of judicial power. (Labuy v. Howes Leather Co. 352 U.S. 249)

Under federal practice, extraordinary writs under 1651 are reserved for really extraordinary causes, and then only to confine inferior court to lawful exercise of its authority when it is duty to do so. (Platt v. 3M 376 U.S. 240) And, it has the jurisdiction to issue alternative writs in proper case, but these writs should be resorted to only where appeal is clearly inadequate remedy; as extraordinary remedies they are reserved for really extraordinary causes. (U.S. v. Richardson 204 f2d 552; e.g. Penn v. U.S. Marshall Services 474 U.S. 34, 43)

Argument

State Court Must Strike A Prior Conviction Which Was Unconstitutional Obtained, Otherwise Ruling On Motion Challenge Was Contrary To, Or Involved An Unreasonable Application Of, Clearly, Establish Federal Law As Determined By The Supreme Court Of The United States

A. Circumstances Surrounding Strike Prior of Residential Burglary:

On June 13, 1993, Defendant Wayne Holloway having been advised

his constitutional rights which includes his rights to be tried by a jury of twelve in his presence and the right to confront witnesses or rebutt evidence in defense. (5th, 6th, and 14th Amend) After understanding these rights Defendant Holloway stood trial for the residential burglary claim, but apparently Holloway was excluded from a jury requested readback of an adverse witness testimony in spite the People's stipulation of Holloway's presence at all time when the jury is in the panel; and in spite Holloway's objection to this adverse witness testimony by testifying at trial under oath that he did not admit or told anyone that he committed the burglary because he was "hungry" (CT0030-0032). Finally, as a result of these trial court errors Defendant Holloway suffered guilty verdict at the hands of the jury. (Take Judicial Notice to Sup Ct No. SF78949)

B. Constitutional Rights Violation :

(i)

Criminal Defendants has a Constitutional Due Process right to be personally present during readback of adverse witness testimony and Criminal Defendant has a Constitutional right to have a readback proceedings stenograph on record

Generally, a criminal defendant has a vested right to be presence at his trial at all times especially when evidence is taken before the trier of facts (jury). His rights to be present at trial is protected under both the federal and state constitutions. (U.S. Const.,

1 6th & 14th Amends., U.S. v. Gagnon 470 U.S. 522; Illinois v. Allen  
2 397 U.S. 337; Pointer v. Texas 380 U.S. 400; Lewis v. U.S. 146 U.S.  
3 370; Hopt v. Utah 110 U.S. 574; Snyder v. Mass 291 U.S. 97; ~~Peo~~ v.  
4 Waidla 22 Cal4th 741; ~~Peo~~ v. Lewis 144 Cal.App3d 279 and so forth)

5 Under California Law, the state constitution guarantee that the  
6 defendant in a criminal cause has the right to be personally present  
7 with counsel, and to be confronted with the witness against defendant  
8 (Cal Const Art I sec 15), whereas section 977 and 1043 of the Cali-  
9 fornia state penal code implements the state constitutional pro-  
10 tection. Under Federal Law, the right of the accused to be present  
11 is obligatory upon the state, and the rules also includes the defen-  
12 dant's right to be present whenever the court communicates with  
13 jury. (Shields v. U.S. 273 U.S. 583)

14 Here, Holloway was guaranteed the right to be present during a  
15 readback or when the jury comes back into the court room as agreed  
16 upon by the People. (CT0034) Although the only plausible explanation  
17 for Holloway's absence would have been if Holloway voluntarily excuse  
18 himself from the court, and even then it had to be authorize under  
19 section 977. Penal Code Section 977 authorize the presence of the  
20 criminal defendant during a requested readback to the jury. The sec-  
21 tion states the following : "In all cases in which a felony is  
22 charged, the accused must be present...during those portions of the  
23 trial when evidence is taken before the trier of fact...the accused  
24 shall be personally present at all other proceeding unless he shall  
25  
26  
27  
28

1 with leave off court, execute in open court, a written waiver of his  
2 right to be personally present, approved by his counsel." At pre-  
3 sent, let the certified record reflex that their is no such waiver  
4 or anything in lieu of a waiver executed on part by Holloway or  
5 even his then attorney - Wayne Gomez. (Take Judicial Notice to the  
6 south bay record ordered by Judge Dave Gill dept-28, RT35)  
7

8 So as intended, a criminal defendant has a constitutional right  
9 to be personally present in the courtromm when a readback of any  
10 kind is done for a deliberating jury. Though, a criminal defendant'  
11 right to be personally present during readback is not limited to  
12 just mere present, but the criminal defendant has the right to have  
13 this request readback proceeding stenograph or record on the certi-  
14 fied record on appeal.  
15

16 In Bustamante v. Eyman 456 F2d 269 et al, the Circuit Court held  
17 that a criminal defendant has the right to be present with attorney  
18 during readback and the right to have that proceeding recorded by the  
19 stenographer; otherwise, the verdict against defendant can not stand-  
20 we reverse...  
21

### 22 Conclusion

23  
24 For the above-stated reasons, the relief sought in the petition  
25 should be granted.  
26  
27  
28

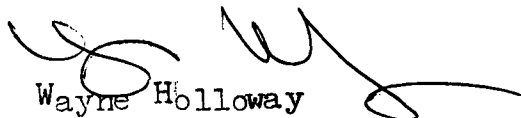
Prayer For Relief

WHEREFORE, petitioner prays the court :

1. issue a writ of habeas corpus
2. declare the rights of Petitioner Holloway
3. reverse the sentence or strike the burglary prior
4. expunge all reference to the underline burglary conviction
5. grant any other and further relief this court deems just, fair, and equatable.

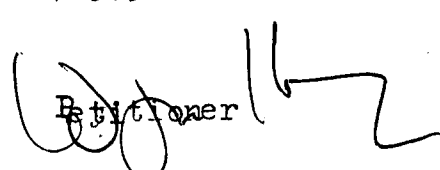
Dated May 08, 2008

Respectfully Submitted

  
Wayne Holloway  
In Pro Per

Verification

I declare under penalty of perjury to the foregoing that its true and correct to the best of my knowledge supported my the certified record on appeal (Dist Ct no. cv-06-00226-LAB) (see also the certified record under Sup Ct No. SF78949)

  
Petitioner

STATE OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO

I am the party of the above entitled actions, a citizen of the United States and over the age of eighteen years, and a resident of San Luis Obispo County. My current address is:

Wayne Holloway  
California Men's Colony-East  
P.O. Box 8101 Room  
San Luis Obispo, CA. 93409-8101

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON May 8, 20 08, AT SAN LUIS OBISPO, CALIFORNIA, 93409-8101.

Wayne Holloway  
PETITIONER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO

I AM A RESIDENT OF SAID COUNTY, I AM OVER THE AGE OF EIGHTEEN YEARS AND ~~NOT~~ A PARTY TO THE ABOVE ENTITLED ACTION. MY BUSINESS ADDRESS IS:

Wayne Holloway  
CALIFORNIA MEN'S COLONY-EAST  
P.O. BOX 8101 / Room 2178  
SAN LUIS OBISPO, CALIFORNIA 93409-8101

ON May 08, 20 08, I SERVED THE WITHIN  
Petition for writ of Habeas Corpus  
and Request for Appointment of  
Counsel

ON THE PARTY: Office of Atty General, S.P. CT  
Appeal Section

IN SAID ACTION, BY PLACING A TRUE COPY THEREOF IN A SEALED ENVELOPE WITH POSTAGE THEREON PREPAID, IN THE UNITED STATES MAIL, AT CALIFORNIA MEN'S COLONY, SAN LUIS OBISPO, CALIFORNIA, 93409-8101, ADDRESSED AS FOLLOWS:

Office of Atty General Clerk of S.P. CT  
P.O. Box 85266 Superior Appeal Section  
San Diego, CA 92186-5266 P.O. Box 128  
San Diego, CA 92212

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.  
EXECUTED ON May 08, 20 08, AT SAN LUIS OBISPO  
COUNTY, CALIFORNIA.

Wayne Holloway  
SIGNATURE OF DECLARANT



JS44

(Rev. 07/89)

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of identifying the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

## I (a) PLAINTIFFS

Wayne Holloway

## DEFENDANTS

John Marshall

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Luis Obispo  
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT San Luis Obispo  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

## (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Wayne Holloway  
PO Box 8101  
San Luis Obispo, CA 93409  
V-04793

## ATTORNEYS (IF KNOWN)

'08 CV 0861 JM AJB

## II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX (For Diversity Cases Only) FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |                            |                            |   |                            |                            |
|----------------------------|----------------------------|---|----------------------------|----------------------------|
| PT                         | DEF                        |   | PT                         | DEF                        |
| <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Citizen of This State   | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Citizen of Another State                                      | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Citizen or Subject of a Foreign Country                       | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |
|                            |                            | Incorporated or Principal Place of Business in This State     |                            |                            |
|                            |                            | Incorporated and Principal Place of Business in Another State |                            |                            |
|                            |                            | Foreign Nation  |                            |                            |

## IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 USC 1651

## V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

| CONTRACT   | TORTS   | FORFEITURE/PENALTY  | BANKRUPTCY   | OTHER STATUTES   |
|--|---|---|--|--|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits<br><input type="checkbox"/> 160 Stockholders Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><b>PERSONAL INJURY</b><br><input type="checkbox"/> 362 Personal Injury-Medical Malpractice<br><input type="checkbox"/> 365 Personal Injury - Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Food & Drug<br><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 RR & Truck<br><input type="checkbox"/> 650 Airline Regs<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (13958)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS - Third Party 26 USC 7609 | <input type="checkbox"/> 400 State Reappointment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce/ICC Rates/etc.<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 810 Selective Service<br><input type="checkbox"/> 850 Securities/Commodities Exchange<br><input type="checkbox"/> 875 Customer Challenge 12 USC<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 892 Economic Stabilization Act<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 894 Energy Allocation Act<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State<br><input type="checkbox"/> 890 Other Statutory Actions |
| <b>REAL PROPERTY</b><br><input type="checkbox"/> 210 Land Condemnation<br><input type="checkbox"/> 220 Foreclosure<br><input type="checkbox"/> 230 Rent Lease & Ejectment<br><input type="checkbox"/> 240 Tort to Land<br><input type="checkbox"/> 245 Tort Product Liability<br><input type="checkbox"/> 290 All Other Real Property  | <b>CIVIL RIGHTS</b><br><input type="checkbox"/> 441 Voting<br><input type="checkbox"/> 442 Employment<br><input type="checkbox"/> 443 Housing/Accommodations<br><input type="checkbox"/> 444 Welfare<br><input type="checkbox"/> 440 Other Civil Rights   | <b>PRISONER PETITIONS</b><br><input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus<br><input type="checkbox"/> 530 General<br><input checked="" type="checkbox"/> 535 Death Penalty<br><input type="checkbox"/> 540 Mandamus & Other<br><input type="checkbox"/> 550 Civil Rights<br><input type="checkbox"/> 555 Prisoner Conditions   |  |  |

## VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

## DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

## VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

Docket Number

DATE 5/12/2008

SIGNATURE OF ATTORNEY OF RECORD

R. Muley